E-VALUE-ating the Art of Positive Employee Relations

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Context Matters

• Although the President took office in January 2009, he only achieved a full, five-member, Senate-confirmed National Labor Relations Board in July 2013

• By early 2014, we started to see case decisions consistent with the pro-union, pro-employee philosophy of the Board majority
NLRB Takes Action

• In December, 2014, the Board issued a final rule implementing a series of changes to the procedures for conducting union elections.
• New rules became effective on April 14, 2015.
• These rules are clearly designed to favor union’s chances of winning the election, primarily by shortening the time between the petition and the election.
Typical Election Timeline

Union Support

<table>
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<tr>
<th>Petition Date</th>
<th>14 Days</th>
<th>28 Days</th>
<th>42 Days</th>
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- Petition Date: 14 Days, 28 Days, 42 Days
“Expeditious” or “Ambush”

• The NLRB General Counsel claims nothing in the new rules “establishes new timeframes for conducting elections or issuing decisions.”

• Rather, the rules merely:
  – remove unnecessary barriers to the fair and expeditious resolution of representation cases;
  – simplify representation-case procedures;
  – codify best practices and make them more transparent and uniform across regions.
Major Provisions

• **Petition**
  – Unions may file electronically.

• **Required Pre-Hearing Lists**
  – Prior to a pre-election hearing, employers must now provide unions with two separate lists of employees:
    • (1) a list of all employees in the challenged, petitioned for bargaining unit; and
    • (2) a list of all employees in the unit the employer contends is appropriate.
Major Provisions

• **Voter List**
  
  - Two business days after the unit issue is decided, a list must be electronically provided including each employee's name, home address, telephone number, email address, work location, shift, and job classification.
Major Provisions

• **Statement of Position**
  
  Employers must now prepare and file a detailed legal position statement addressing critical threshold issues including:
  
  • (1) any exclusions from the bargaining unit;
  • (2) the overall appropriateness of the unit;
  • (3) the proposed date, time, and place of the election; and
  • (4) any other issues the employer seeks to raise at the hearing.
Statement of Position

– Any issue not raised in the employer's Statement of Position is waived (employer may introduce no evidence).

– If the employer does not provide the list of employees, the employer cannot contest the appropriateness of the unit at any time.

– Parties may make oral closing arguments, but post-hearing written briefs are only allowed "with special permission of the regional director."
Unit Issues

• **Deferral of Issues**
  - Regional Directors now have discretion to defer litigation concerning individual eligibility or inclusion issues that do not significantly change the size or character of the unit until after the election.
  - GC says this gives RD's the "tools to reduce litigation of issues that are unnecessary to decide before the election and that may be rendered moot by the election results or resolved by the parties after the election."
Unit Issues

- Disputes over eligibility to vote or inclusion in an appropriate unit “ordinarily” need not be litigated or resolved before an election is conducted. The rules do not define “ordinarily” . . . however, it is clear under Board precedent that it would typically be appropriate for regional directors to exercise their discretion in favor of deferring litigation of eligibility/inclusion issues affecting up to 20 percent of unit employees.
Hearing/Unit Issues

• In those cases where unit issues are deferred, the issues may be litigated, if necessary, in post-
election proceedings.

• At the close of hearing, parties will be permitted to make oral arguments on the record. Parties will be permitted to file post-hearing briefs only with special permission of the regional director. The regional director will specify the time for filing such briefs and may limit the subjects to be addressed.
Vote First, Decide Who Votes Later (or not)

• Eligibility and inclusion issues concern either:
  – (1) whether an individual or group is covered by the terms used to describe the unit, or
  – (2) whether an individual or group is within a particular statutory or policy exclusion or should not be in the unit.
Vote First, Decide Later

• For example, if the petition calls for a unit of "production employees," excluding "guards and supervisors as defined in the Act," eligibility/inclusion issues would include:
  – (1) whether employees who perform quality control functions are production employees;
  – (2) whether Joe Smith is a production employee;
  – (3) whether production foremen are supervisors; and
  – (4) whether production employee Jane Doe is a supervisor.
Think Ahead

• **Supervisors**
  – Lack of clarity on unit issues, especially supervisors, could cause problems with identifying your team.
  – Assess whether to bolster 2(11) criteria for those who you want to campaign, and do the opposite for those you want in the unit.
Timeline Under New Rules

- **Day 0 by Noon:** Union/Petitioner Serves Petition, Statement of Position Form
  - Petition must be accompanied by a Statement of Position Form and a Description of Representation Case Procedures Form
  - Must be served on employer and all other parties named in petition and must file certificate of service with the Region

- **Day 0 by end of Day:** NLRB will docket the Petition and send a docket letter and Notice of Representation Hearing to the parties
  - The Docket Letter and Notice of Representation Hearing will specify the due date for the employer’s Statement of Position.

- **Day 2:**
  - Employer must post a Notice of Petition for Election
Day 7 at 12:00 p.m.: Statement of Position and two Employee Lists must be filed:

- “Day 7” is subject to change, based on the following:
  - If the Employer wishes to postpone the due date of the Statement of Position, the Regional Director may extend the deadline:
    - for up to two (2) business days upon request of the employer showing “special circumstances”
    - for more than two (2) business days upon request of the employer showing “extraordinary circumstances”
Hearing Day

- **Day 8: Hearing Date**
  - The “eight days” calculation excludes intervening Federal Holidays.
  - Under the following circumstances, the Regional Director may extend the 8 day rule:
    - for a time period determined by the Regional Director, if the Regional Director determines that the case presents “unusually complex issues”
    - for up to two (2) business days upon request of a party showing “special circumstances”
    - for more than two (2) business days upon request of a party showing “extraordinary circumstances”
More Hearing Issues

• If the Hearing is postponed, parties will have at least seven (7) days’ notice of the due date for the completion of the Statement of Position form; in “all cases” requests must be served simultaneously on all parties, and e-filing is preferred.
  
  – A request to postpone a hearing IS NOT automatically treated as a request for an extension of the Statement of Position due date.
Timeline: On from Day 8

• Conclusion of Hearing:
  – union may waive “part or all” of the ten (10) day period it is entitled to have for the voter list.

• Decision and Direction of Election Issued by Hearing Officer

• Two (2) Business Days Post-Decision and Direction of Election:
  – Regional Director and Parties named in the Decision must RECEIVE the Voter list.
Day 10 Forward

- Employer (*not* the Region) must provide union and regional director with the Voter List.

- The parties can agree to an extended time for the employer to produce the voter list beyond the two (2) business day regulation.

- This agreement must be approved by the Regional Director, and it is “expected that any extension will be brief.” The election agreement and/or direction of election might also extend the time allotted to serve the Voter List.
Day 9 (we assume): Region Sets the Election Date

- No set date -- factors that will likely determine the Election Date:
  - Number of likely days of hearing
  - Length of time required to write the decision
  - Whether the parties entitled to the voter list have waived some or all of the time to have the list

- Still within the discretion of the RD
  - But marching orders are to hold election as soon as practicable.
Election Day

• Notice of Election:
  – Three (3) Working Days Prior to 12:01 a.m. on Day of Election: Employer must post a Notice of Election

• **Day 13**: Election Day – in some cases this period will be longer, but can be as little as 13 days after the Petition
How would you respond?

• Obviously, the new rules place an emphasis on:
  – Prevention (ideally); or
  – Quickly making the case to employees that they should vote no..

• In response to the rules, employers and counsel are developing something new:
  – Not “campaign-in-a-can,” but a road map.
Sample Road Map

- **Day 1**: Letter to employee homes regarding petition and plan for communications regarding this important decision over the coming weeks.
  - Supervisor training on lawful communications and strategy for campaign.
- **Day 2**: Supervisors engage employees and report back on issues and concerns.
- **Day 3**: Small Group Meetings: The Reality of Collective Bargaining
- **Day 4**: Continue supervisor engagement and reporting.
Sample Road Map

- **Day 5**: Know the Facts About the _____ Union: array of information on the history, finances, dues, and work stoppages/closures experienced by the petitioning union.
- **Day 6**: Supervisor engagement.
- **Day 7**: Small Group Meetings: Strikes and Lockouts
- **Day 8**: Report back to the employees on the Representation Hearing conducted by the NLRB.
Sample Road Map

• **Day 9**: Know the Facts About the Election

• **Day 10**: Small Group Meetings: Union Dues, Fines and Other Discipline (thanks to NLRB rules, they already have your e-mail).

• **Day 11**: Supervisor engagement on the issues.

• **Day 12**: 25\textsuperscript{th} Hour Speech

• **Day 13**: Election
Positive Employee Relations

• Once you are in a campaign, anything can happen.
• Best union avoidance program results in preventing employees from wanting to sign union authorization cards.
• This requires attention to several important facets of employee relations.
Steps You Can Take

• Assess quality of supervisors
  – Do they “go to the fire” or avoid problem issues (or worse, cause issues)?
  – Are they successful in terms of both production and achieving employee satisfaction among subordinates?
  – Are they prepared and able to assist in the event of a card-signing effort or an actual campaign?
Steps

• Improve Communication
  – Ensure that employees know what is going on and why things are happening (particularly in the event of change).
  – Recognize employees for contributions and create meaningful opportunities for advancement.
  – Make sure employees are aware of all the benefits they enjoy as part of your organization.
More Steps

- Incorporate HR’s role into change management and generally creating positive employee climate.
- Deliver on promises.
- Use employee satisfaction/attitude surveys.
- Review policies for issues that could arise during a campaign.
- Assess possible bargaining unit issues and other matters that may have to be raised before the Board on a tight timeframe.
- Make decisions on who will handle the various roles required during the campaign (i.e., who be on the team, who will have the final say on written communications).